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UNITED STATES SUPREME COURT,

OCTOBER TERM, 1903.

THE NORTHERN SECURITIES COMPANY and others,
Appellants,
vs.
THE UNITED STATES,
Appellees.
No. 277.

BRIEF OF JOHN W. GRIGGS FOR THE NORTHERN SECURITIES COMPANY, APPELLANT.

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Northern Securities Company.

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I.

THE ACTS OF THE DEFENDANTS DO NOT CONSTITUTE A CONTRACT, COMBINATION, OR CONSPIRACY IN RESTRAINT OF INTERSTATE TRADE OR COMMERCE WITHIN THE MEANING AND PROHIBITION OF THE ACT OF JULY 2, 1890, KNOWN AS THE SHERMAN ACT.

The United States rests its case upon two allegations:

First.—That the Northern Securities Company has been formed and has taken over a majority of the shares of the two railroad companies in the manner indicated by the pleadings and proofs.

Second.—That the intended and the necessary effect of those acts is to destroy competition between the two railroad companies.

After reciting the formation of the Northern Securities

Company and the acquirement by it of the shares of the Northern Pacific and the Great Northern Railway Companies, the Attorney-General, in his petition, describes his view of the effect of the arrangement as follows:

> "In this manner, by making the stockholders of each system jointly interested in both systems, and by practically pooling the earnings of both systems for the benefit of the former stockholders of each, and by vesting the selection of the directors and officers of each system in a common body, to wit, the holding corporation, with not only the power but the duty to pursue a policy which would promote the interests, not of one system at the expense of the other, but of both at the expense of the public, all inducement for competition between the two systems was to be removed, a virtual consolidation effected, and a monopoly of the interstate and foreign commerce formerly carried on by the two systems as independent competitors established" (Par. VI).

And again (in Par. VIII):

> "By reason whereof, a virtual consolidation under one ownership and source of control of the Great Northern and Northern Pacific railway systems has been effected, a combination or conspiracy in restraint of the trade or commerce among the several States and with foreign nations formerly carried on by the defendant railway companies independently and in free competition, one with the other, has been formed and is in operation, and the defendants are thereby attempting to monopolize, and have monopolized, such interstate and foreign trade or commerce."

Again (in Par. XII):

> "If the Government fails to prevent the carrying out of the combination or conspiracy aforesaid, and the defendant, the Northern Securities Company, is permitted to receive and hold and act as owner of the stock of the Northern Pacific and

Great Northern Railway Companies as aforesaid, not only will a virtual consolidation of two competing transcontinental lines, with the practical pooling of their earnings, be effected, and a monopoly of the interstate and foreign commerce formerly carried on by them as competitors be created, and all effective competition between such lines in the carrying of interstate and foreign traffic be destroyed, but thereafter, to all desiring to use it, an available method will be presented, whereby, through the corporate scheme or device aforesaid, the Act of Congress of July 2, 1890, may be circumvented and set at naught, and all transcontinental lines, indeed the entire railway systems of the country, may be absorbed, merged and consolidated, thus placing the public at the absolute mercy of the holding corporation."

Again (Paragraph XI):

"The defendant, the Northern Securities Company, was not organized in good faith to purchase and pay for the stocks of the Great Northern and the Northern Pacific Railway Companies. It was organized solely to incorporate the pooling of the stocks of said companies and to carry into effect the unlawful combination or conspiracy aforesaid. The Northern Securities Company is a mere depositary, custodian, holder and trustee of the stocks of the Great Northern and the Northern Pacific Railway Companies, and its shares of stock are but beneficial certificates issued against said railroad stocks to designate the interest of the holders in the pool. The Northern Securities Company does not have, and never had, any capital sufficient to warrant such a stupendous operation."

The answer of the defendants is:

First.—That the formation of the Northern Securities Company and the acquirement by it of stock of the two railroad companies was a lawful transaction, governed

solely by local State laws, and not in contravention of any provision of the federal constitution or statutes.

Second.—That the acts of the defendants were all done in good faith, without any purpose to destroy competition or restrain trade.

To put it more concisely: The defendants contend that what they have done is lawful, has no direct effect in restraint of competition, and was not intended to restrain competition.

The formation of the Northern Securities Company was the result of a broad and enlightened business policy that is directed towards the enlargement of trade, the development of a great and rich section of our country, and the firm establishment of a transportation system large enough and strong enough to enter into and maintain itself in competition for the transcontinental trade of America as well as in the trans-Pacific trade between America and the Orient, against the carrying systems not only of the United States, but also of Canada and the European States by way of the Suez Canal.

The defendant, the Northern Securities Company, is a corporation lawfully organized for the transaction of lawful business. Nevertheless, the United States alleges that the Company was not organized in good faith to purchase and pay for the stocks of the Great Northern and Northern Pacific Railway Companies; that it was organized solely to incorporate the pooling of the stocks of said companies and to carry into effect an unlawful combination and conspiracy, having for its object the practical merger of the two railway companies and the monopolizing of the trade and commerce carried on by them respectively, in violation of the Act of July 2, 1890.

What proof have the United States offered to support this allegation?

We can confidently say—nothing, beyond the fact that

the Securities Company has been organized and holds a a majority of the stock of both railway companies. But that is a long way from proving that it was organized "solely to carry into effect an unlawful combination and conspiracy."

The Court will not impute bad motives where the acts of the parties are consistent with honest and lawful purpose, unless the *mala fides* is clearly shown by proofs that would justify conviction in a criminal action, and that exclude the existence of good faith.

The answers of the Northern Securities Company and of the other defendants set forth *in extenso* the history of the transactions extending over many years which gradually led up to the consummation of the long-existing desire and design of the leading stockholders of the Great Northern to combine their holdings of stock in that road so as to prevent it from becoming scattered. The facts alleged in the answers are more than supported by the testimony of the principal participants in the organization of the Securities Company.

The Great Northern and the Northern Pacific, while competitors in some degree, have never been hostile to each other. There is a great difference between rivalry and hostility. Competition can be, and is, carried on between individuals and corporations, not only without rancor and jealously, but in a spirit of friendliness and with a mutual desire to promote good relations in all matters that touch the mutual interests of the competitors. And, with due respect, it is submitted that the law does not forbid that.

The complainant has introduced the testimony of James J. Hill, given in the case of Power *v.* Northern Pacific Railway Company.

Mr. Hill was searchingly questioned as to whether there was any agreement or understanding of any kind

between the Northern Pacific and the Great Northern with reference to the policies of the respective roads touching one another in regard to their territory or operation, or their interests with the public, and Mr. Hill emphatically and in detail denied that there was any such understanding or agreement.

Similar denials are made by John S. Kennedy, William P. Clough, J. P. Morgan and Charles S. Mellen.

In particular, Mr. Mellen testifies that "there was a general understanding between all the railroad companies that nobody will do anything that affects his neighbor unfavorably without advising the neighbor before doing it, and that agreement is no different with the Northern Pacific and the Great Northern than it is with the Northern Pacific and the Chicago and North western or any other railroad connecting, competitive or otherwise."

Mr. Mellen says that "each company is continuing in competition, offering superior facilities, and bringing pressure to bear, and influence, personal and otherwise, in its own behalf."

Among other facts in disproof of the Government's allegation that the Securities Company was formed solely to create a merger of the two railroad companies is that testified to by Mr. Hill, that it purchased the stocks of the Crow's Nest Coal Company and two other coal companies, paying for them from three to four millions of dollars.

Another fact to be constantly kept in mind is that none of the parties, nor all of the parties put together, who formed the Securities Company, were holders of a majority of the capital stock of the Great Northern Railway Company. There were about 1,600 different stockholders in that company and from 400 to 500 different stockholders in the Northern Pacific. Only a few

of these were actually consulted, and the action of the incorporators was not made dependent upon their approval or confirmation. They were merely offered the opportunity to come in and sell their stock to the Securities Company, which some, but not all of them, did.

At the time the Securities Company was formed there was no certainty that a majority of the stock of either of the railroad companies would be acquired by it, and it would have been formed and have continued if no other persons than the original projectors of the company had come in and exchanged their stock. Such is the testimony of all the persons participating in the organization.

The original conception, the primordial germ, out of which the Northern Securities grew, is to be found much further back than the transactions of 1901. The dramatic incidents of that year merely hastened the development and maturity of the conception.

The purpose and intent of the originators of the scheme cannot be subject to dispute. It rests not only upon the sworn testimony of the most eminent and successful business men of the country, but is substantiated by collateral facts that furnish the most adequate and sstisfactory reasons for the action that was finally taken, without requiring us to resort to an imputation of illegal and criminal motive.

Briefly stated, the circumstances are these:

The defendants, Messrs. Hill, Kennedy, James, and Mr. Samuel Thorne and others, not exceeding ten in number, formed a group of active and influential persons, who had developed and maintained the Great Northern enterprise from its origin, and who, not holding a majority of its stock, yet had the concurrence, support and good-will of the other stockholders, and were, because of their successful management and their influence, continued from year to year in control.

As early as 1893 these gentlemen took up for consideration the subject of continuing their policy in the management of the Company by some arrangement which would prevent their stock from being scattered in case of death. This was the original conception out of which the Northern Securities Company developed.

At the time of the reorganization of the Northern Pacific in 1896 these same gentlemen, independently of each other, acquired about twenty millions of dollars of stock in the New Northern Pacific Company, which substantially they held down to the formation of the Northern Securities Company.

Here we find that as early as 1896 a duality of interest had arisen whereby these gentlemen became concerned in the welfare of both companies.

In April, 1901, the Northern Pacific and the Great Northern made the purchase of the stock of the Burlington, and in payment for it issued their bonds. This indicated a very close relationship, and a perfect confidence by each company in the co-operation of the other in the broad policy which the purchase of the Burlington was intended to make possible and to carry out. That policy was to fit the Great Northern and the Northern Pacific to enter into competition for transcontinental traffic as rivals of the other transcontinental lines. It was an arrangement in favor, and not in suppression, of competition. How splendid have been the results of this policy, not only to the companies themselves, but to the vast extent of country penetrated by the two parallel lines, appears from the evidence of Mr. Hill and others. A new commercial empire has been thereby created in the Northwest, and it has become possible for the products of that region to be profitably transported and marketed in the East and Middle West to an extent that could not have been accomplished in many years without the joint purchase of the Burlington.

This mutuality of interest possessed by Mr. Hill and his associates in the two companies, and this mutuality of interest of the two companies in the Burlington system, and their obligation upon the bonds, required that the relations between the two companies should not only be friendly but intimate in all matters of policy that did not relate merely to local traffic arising and ended upon their own original and proper lines.

The so-called "raid" upon the stock of the Northern Pacific in May, 1901, threatened the stability of the structure so carefully and beneficently erected, and it was this that hastened to a final consummation the old conception of a plan of placing the stock owned by Mr. Hill and his associates in such a position that it could not be dislodged by any ordinary assault, thereby securing permanency and stability of management, and the continuance of the policy which looked to the development of both the roads and the country which they traversed through the operation of the Burlington as a joint property, constituting one united system toward the East, of which the Great Northern and Northern Pacific were two radiating lines toward the Pacific Coast.

This original purpose, limited to the participation of Mr. Hill and his immediate associates, grew naturally and justly into a plan, which, out of considerations of fair dealing only, extended to all the other stockholders the opportunity to come in upon the same basis.

Thus every step of the proceeding which is set forth and explained in detail by these gentlemen in their evidence without the gainsaying or contradiction of any person, was natural and progressive and consistent with the original honest and beneficent purpose of the parties.

When the Northern Securities Company had acquired a majority of the stock of the two railroad companies it did not any more certainly or firmly control the policy

of the two railroads than did Mr. Hill and his associates under the former conditions. It is perfectly credible that no idea of any pooling or merger in the sense charged in the bill of complaint ever entered the head of any of them. Whatever influence they desired in both companies they already possessed. There existed mutuality of interest, and so far as control that depends upon moral and not upon legal conditions was concerned, they possessed that. The objects, motives and purposes of the parties were entirely different from the criminal ones charged by the Government. Those motives and purposes are reasonable, intelligent, creditable to the hearts and consciences of the actors, and in no wise injurious to the public. They did not change in any practical way the situation, so far as competition between the two companies was concerned. They did not change the legal status of one company toward the other, nor in anywise interfere with the internal organization, rights, privileges, or duties of either company.

Neither of the railroad companies, as such, participated in any way in the formation of the Securities Company, and neither of the railroad companies had any more relation to the matter than has a corporation to the daily purchases and sales of its outstanding stock in the public market.

In answer to the allegation of the Government in its bill of complaint, that this is a practical pooling of the stocks of the two companies, we answer that the word "pooling" as used by the complainant is intended to have an offensive meaning and an application which cannot be derived from the lawful acts which the defendants have done. The stocks are not pooled under any trust arrangement or agreement whatever, and that term is no more applicable to the arrangement than it would be if one natural person had purchased in his own right.

Of course, it is a natural consequence of the ownership of the stock that the dividends declared and paid thereon go to the owner, and this is no more true with reference to the Northern Securities Company as owner than it would be as to any other holder.

The proofs clearly establish the fact that the co-operation of these two railway companies, both before and after the formation of the Securities Company, was intended, not for the purpose of monopolizing trade and commerce, but for the purpose of strengthening, augmenting and extending the trade and business of the two companies in both transcontinental and worldwide competition with other public carriers. The result is not pernicious, but beneficial, and should be marked with public approval, rather than by legislative and governmental obstruction.

II.

THE CREATION OF RAILWAY CORPORATIONS; THE FORM OF THEIR CORPORATE ORGANIZATION; THE CHARACTER AND QUALITIES OF THEIR CORPORATE STOCK; THE ROUTES WHICH THEIR ROADS SHALL TAKE, WHETHER THEY MAY CONNECT WITH OTHER ROADS RUNNING IN THE SAME GENERAL DIRECTION, WHETHER THEY MAY OR MAY NOT CONSOLIDATE WITH PARALLEL LINES, OR OPERATE PARALLEL LINES THROUGH DIFFRENT PORTIONS OF A STATE—ALL THESE MATTERS ARE, AND ALWAYS HAVE BEEN, SUBJECTS OF STATE JURISDICTION.

As was said in Louisville and Nashville R. Co. *v.* Kentucky (161 U. S., 702):

> "In the division of authority with respect to interstate railways, Congress reserves to itself the superior right to control their commerce and forbid interference therewith, while to the States remains the power to create and to regulate the

instruments of such commerce, so far as necessary to the conservation of the public interests."

It has been frequently held that it is within the power of the States to impose restrictions upon the general authority of railroad corporations engaged in interstate commerce to consolidate; also, that the States possess the power to forbid the purchase of, or consolidation with, competing lines (see Louisville and N. R. Co. *v.* Kentucky, and cases there cited). The franchise, therefore, of a railroad corporation being derived from the State, the extent of its power to become interested in, or to become subject to, the control of another corporation has always been a question solely of State regulation. Congress has never assumed any such power over the internal affairs of corporations or their corporate shares, nor has Congress ever attempted to regulate in any way the method by which corporate franchises might be extended, merged or consolidated.

Nor was the Sherman Act intended to have such effect. On the contrary, the process of lease, merger and consolidation has gone on without impairment ever since the passage of that act. Consolidation has been the rule rather than the exception, and all by virtue of State authority, unchallenged and unquestioned by the Federal Government. If these consolidations were fraught with such great evil, it is to be assumed, first, that the States would not have permitted them; and second, that Congress, if it had the power to interfere, would have taken steps to check them. The courts of the United States, in numerous cases since the passage of the Sherman Act, have been called upon to restrain projected consolidations upon the ground that they were contrary to State statutes, but in not one of these suits has any suggestion been made that the

legislation of Congress, expressed in the Sherman Act, had any bearing on the subject.

The case of Pearsall *v.* Great Northern R. Co. (161 U. S., 648) was decided March 30, 1896. This was a stockholders' suit, and the law against the consolidation was the law of the State of Minnesota.

The case of Louisville and N. R. Co. *v.* Kentucky was decided March 30, 1896, and was a suit on behalf of the Commonwealth of Kentucky to enforce a provision of the State Constitution.

The power exists in each State by appropriate enactments not forbidden by its own nor the Federal Constitution, to regulate the relative rights and duties of all persons and corporations within its jurisdiction so as to provide for the public convenience and the public good. State legislation relating to commerce is not to be deemed a regulation of interstate commerce simply because it may, to some extent, or under some circumstances, affect such commerce. (Lake Shore and Mich. Southern Ry. Co. *v.* Ohio, 173 U. S., 285.)

The opinion in the case last above cited refers to the previous decisions of the Supreme Court on the same subject, and gives extracts from many of them.

In Missouri, Kansas and Texas Ry. *v.* Haber (169 U. S., 613) it was held that the authority given by Section 5258 of the Revised Statutes of the United States to carry "freight and property" over their respective roads from one State to another State, did not authorize a railroad company to carry into a State cattle known, or which by due diligence might be known, to be in such condition as to impart or communicate disease to the domestic cattle of such State.

And in the case of Lake Shore, &c., *v.* Ohio, *supra*, it was expressly adjudged that the above statutory provision was not intended to interfere with the authority

of the States to enact such regulations, with respect, at least, to a railroad corporation of its own creation, as were not directed against interstate commerce, but which only incidentally or remotely affected such commerce, and were not in themselves regulations of interstate commerce, bue were designed reasonably to subserve the convenience of the public.

In Cleveland, Cincinnati, Chicago and St. Louis Ry. Co. *v.* Illinois (177 U. S., 514: 1900) the same subject was further discussed in an opinion by Mr. Justice Brown, and the decision in the Lake Shore case was approved.

The learned Circuit Court, from whose decree this appeal is taken, did not find as matter of fact that the defendants had in any way restrained trade or commerce; or that they had attempted so to do; or that they had contracted or combined so to do.

What the Court did find and decide was, that the defendants had done certain things whereby they had *obtained the power* to suppress competition between two interstate carriers who own and operate competing and parallel lines of railroad. This idea is repeated again and again throughout the opinion. It speaks of "a direct restraint of interstate commerce because it would have placed in the hands of a small coterie of men *the power to suppress competition* between two competing interstate carriers."

Again:

> "By what has been done *the power* has been acquired to suppress competition between two interstate carriers."

And, in another place:

> "The reasoning which led to the acquisition of that charter would seem to have been that while as individuals the promoters could not, by agree-

ment between themselves, place the majority of the stock of the two competing and parallel railroads in the hands of a single person or a few persons, giving him or them *the power to operate* the roads in harmony and stifle competition, yet that the same persons might create a purely fictitious person termed a corporation, which could neither think nor act except as they directed, and by placing the same stock in the name of such artificial being, accomplish the same purpose."

Again:

"It is pertinent, therefore, to inquire in what way the existing combination that has been formed does affect interstate commerce. It affects it, we think, by giving to a single corporate entity, or more accurately, to a few men acting in concert and in its name and under cover of its charter, *the power to control all the means of transportation* that are owned by two competing and parallel railroads engaged in interstate commerce; in other words, *the power to dictate every important act which the two companies may do;* to compel them to act in harmony in establishing interstate rates for the carriage of freight and passengers; and generally to prescribe the policy which they shall pursue."

Again:

"*The power* was not only acquired by the combination, but it is effectually exercised, and it operates directly on interstate commerce, notwithstanding the manner of its exercise, by controlling the means of transportation, to wit, the cars, engines and railroads by which persons and commodities are carried, as well as by fixing the price to be charged for such carriage."

Again:

"Congress aimed to destroy *the power to place any direct restraint on interstate trade or commerce*, when by any combination or conspiracy,

formed by either natural or artificial persons, *such a power had been acquired.*"

Again:

"It is our duty to ascertain whether the proof discloses a combination in direct restraint of interstate commerce—that is to say, *a combination whereby the power has been acquired to suppress competition.*"

If that be the true test of the applicability of the Sherman Act, then the question hereafter will always be, not have the defendants restrained trade, but have they the power to do so?

The process by which a railroad company is created and gradually evolved into an interstate line has generally been something like this:

A State grants a charter for a road wholly within its own jurisdiction. Afterwards, by further legislative grant, the company is empowered to extend its line into an adjoining State. In order to do this the authority of the second State is also required. So that the vitalizing acts which give life to the enterprise are solely derived from State governments. When traffic is begun from one State to the other, interstate commerce is being carried on. But the Federal Government has done nothing; it has not given any consent, nor has its consent been asked. The company, when it engages in interstate commerce, becomes at once subject—as to that portion of its business which is interstate—to the laws of the United States passed to regulate commerce between the States. As to all other business, it is regulated solely by State legislation. Now, the form of its charter, the amount and character of its shares, the internal conduct of its affairs, corporate meetings, officers, directors, dividends, right of stockholders to vote, the negotiability of the shares—all these, it is submitted, are purely internal,

and not in any wise subject to Federal jurisdiction, under the guise of regulating interstate commerce.

Suppose, now, that there are two such corporations operating parallel and competing lines. The States which granted their franchises authorize the two companies to consolidate their stock and franchises into one corporation; or they allow one road to be leased to and operated by the other; or they permit one to buy the capital stock of the other. Here again the States have been acting within the sphere of their peculiar and appropriate power. Is there any Federal regulation of interstate commerce which forbids such action by the two States?

None has ever been suggested prior to this case.

Would the Sherman Act prevent the State of Minnesota from repealing the charter of the Great Northern Railway Company?

Would it prevent the stockholders from effecting a voluntary dissolution of the corporation?

Would it compel the corporation to operate the road if they saw fit to abandon it?

It is apparent that each one of these things, if done, would destroy whatever competition existed between the two roads; but that result would, of course, be incidental, and not different in principle from an act which resulted in the merger of the two companies.

The right to be a corporation, to engage in interstate commerce, to contract or expand its field of operations, to own one, or two, or many lines, whether parallel or merely continuous, is conferred by the State.

The power of Congress to regulate is confined to the actual conduct of the interstate business, to commerce itself, and that which directly affects commerce.

It can regulate rates, forbid preferences, institute inspection, prevent contracts or agreements or combina-

tions between different corporations, the direct object and effect of which is to restrain commerce.

It will be going a much longer way than any Federal court has ever gone before to adjudge that Congress, under *its power to* regulate commerce, can regulate the *ownership of the instrumentalities of commerce*, prescribing that one company or one person may own but one road or one line of vessels operating between the same points.

Congress may regulate rates and fares, but cannot, without doing violence to the right to acquire and own property, forbid one person from purchasing and using what may lawfully be owned and used by another.

In the case in hand each railroad company remains a separate corporation. There is no merger, no consolidation, no agreement to combine. Each corporation, as before, has its own property, its own capital stock, its own charter, its own directors, officers, and everything else, dependent in no way upon the action or interest of the other company.

All that has been done, even as contended by the Government, has been to concentrate the ownership of a majority of the shares of the two companies into one hand, the owner being a corporation controlled by the same men who would own and control a majority of the capital stock of both railroad companies if the holding company had not been formed.

The Government asks for an injunction and a dissolution of the Northern Securities Company, not because it has done any act or entered into any agreement which has the direct effect of destroying competition between the two railroads, but because as the owner or holder of the majority of shares of the two railroad companies *it has the power*, by virtue of its identity or

partial identity of officers, of controlling both those companies and *may* thereby affect competition.

The Government does not show that competition has been affected. It occupies a *quia timet* attitude. Because the stockholders of the two railroad companies have effected a combination of ownership of their shares, the Attorney General says, they have put it in the power of the Northern Securities Company to do something which will injuriously affect competition.

Conceding, as it must be conceded, that a holding company is a lawful organization, when does it by force of peculiar circumstances become unlawful?

If it holds less than a majority of the shares of two parallel and competing companies, is it unlawful?

If holding less than a majority, nevertheless, by virtue of its influence it is able to and does control the personnel of the two boards of directors, is it then an unlawful organization?

If holding more than a majority, it exercises no control whatever; if its shares came to it incidentally in the course of time and of ordinary purchase and sale—is it unlawful the moment its holdings attain a majority in both companies? and does it become a lawful concern when it has parted with enough shares to put it in a minority?

Suppose Mr. James J. Hill, holding stock in both companies, but less than a majority, were able by his influence to secure the election of separate boards of directors who would act solely according to his dictation and wishes, could he be restrained from exercising his influence to that end?

Could Mr. Hill be enjoined if he owned a majority of shares of both railroads?

Is it not apparent that the Court cannot control lawful acts that result from lawful ownership of stock? The

Court will not assume to dictate how a stockholder shall vote at a corporation meeting; nor will it interfere with him in exercising any influence he may possess in the choice of officers or in any other line of corporate conduct or discretion or policy. *What it will do, and all it can do, is to direct its mandate against things that the two railroad companies may do by way of agreement or combination in direct restraint of trade or competition.*

If they agree on a joint tariff or division of territory, or do any other act which as between other companies would be contrary to the statute of 1890, they may be stopped, their arrangement dissolved, and their officers indicted.

But to say that one person, or several persons, cannot acquire or own a majority of the stock of two competing railroad corporations because they are thereby occupying a vantage ground from which they can, if they choose, effect an agreement or understanding between the two companies in restraint of competition, is to say that the power to commit a crime is equivalent to its actual commission.

If the Northern Securities Company has done anything that directly affects trade or commerce as carried on over these two roads, let us know what it is.

Where is the agreement? What evidence has the Government brought forward to prove a single thing done, or agreed to be done, or even secretly contemplated that as a direct act touches anywhere or in any way the conduct, policy, or operation of either road?

All parallel lines of railway or steamships do not neecssarily and actually compete. There must exist a spirit of competition in the respective managements in order to have actual competition. No law can compel railroad companies to compete, and no law has ever assumed to do so. No law has ever assumed to forbid all

the arrangements of business, the ownership of stock, the voluntary suppression of active rivalry in trade, by which actual competition may be prevented. The most that statutes have done is to forbid consolidations of corporate entities, by which two or more concerns in a position where actual competition would naturally and probably exist are fused into one; combinations, contracts or agreements whereby naturally competing rivals voluntarily undertake to do away with competition by arranging a common rate, a division of territory or a pooling of earnings. In all these cases it is the actual consolidation, or combination, or contract, or other arrangement by whatever name known, which is forbidden. The law does not denounce the motive, or spirit, or judgment of the managers or owners of enterprises which are naturally rivals where their motive, or spirit, or judgment is friendly to each other and disposed to avoid actual and injurious competition.

Nor does the law forbid the respective owners or managers of such enterprises from acquiring an interest in rival concerns by way of gift, purchase or bequest. To do so would be to forbid the exercise of the natural right to acquire and hold property. No law forbids one person to buy and hold stock in two corporations engaged in business naturally competitive. It does not forbid the ownership of a minority of stock in such companies, and no more does it forbid the ownership of a majority of stock in both companies.

The companies remain distinct; the stockholders are not the corporation; each company is just as much subject to all the requirements of the law as though its stockholders were entirely different.

Pullman Car Co. *v.* Missouri Pacific Ry., 115 U. S., 587.

The companies may not combine, consolidate or agree in violation of law; they are still separate persons, distinct entities. But the law cannot compel them to fly at each other's throats, or to take and hold a positive and active attitude of hostility to each other.

To express it shortly, the law forbids some things which tend to destroy competition; it does not forbid everything which may tend to enable rival companies to exist in a state of harmony.

A state of non-competition is not required by the law; hostility or rivalry is not commanded as a corporate duty.

The fallacy of this whole argument against community of interest in the stock of competing companies lies in mistaking the object of the statutory provision for the means and methods enacted to attain that object. The object is to maintain competition; the means chosen to attain that object are the statutory commands against conspiracies, combinations and mutual agreements.

The legislative command is not that companies shall compete, but that they shall abstain from certain enumerated acts which tend to prevent competition. All acts not expressly enumerated and forbidden are lawful, even though they may tend to lessen the spirit of competition.

No legislature has ever been or ever will be able to enumerate all the things which tend to interfere with active rivalry in business.

Merely because a specific act has such a tendency is no justification whatever for calling it unlawful, unless it be one falling within the category of acts forbidden. The holding by one person of a majority of stock of two competing railroad companies is not forbidden and is not unlawful.

Cannot companies whose stock is owned by the same person compete?

Because the beneficial owner of two steamboats is the same person cannot the boats compete?

It may be said that they probably will not; or at any rate that they will not compete as actively as though they belonged to rival owners.

No law compels them to compete. The law leaves them to their own inclinations as to whether they will cut each other's throats.

It does not require them to fly at one another.

What it does do is to say that they shall not make any contract or combination in restraint of trade or competition.

It does not forbid one owner from selling his steamboat to the other, although thereby competition which would otherwise exist might be prevented. The resulting effect upon competition would be an indirect result of a lawful act.

It never yet has been held that any sale of property anywhere was void under this Federal statute. Things that corporations have done and agreed to do in actual operation of the instruments of commerce the courts have restrained, but they never yet have said that the right and title to purchasable property depend on the amount of it that one has, or upon the effect that his possession of it may have upon commerce or business. The States have never set a limit to the amount of property a man may buy. Of course the courts can not set such a limit. All the property that one can lawfully buy he has a right to buy and hold, and no man can draw the line between a majority of the stock of a corporation and a minority, and say you have a right to own one and you have no right to own the other.

Government cannot say to a citizen of Maryland who

is doing a wagon express business across the Potomac with Virginia, "You cannot buy the wagon and outfit of your competitor because thereby you are tending to restrain competition!" It can say "You have no right to make a bargain with your competitor that you and he will each charge fifty cents a hundred pounds for what you transport." The one is a direct agreement affecting the interstate commerce they carried on, the other is a sale of property. And if a man engaged in the express business across the river has not the right to have the benefit of the market with his competitor for the sale of his property, then he is restrained in the free exercise of the right to dispose of that which he has, and probably the best customer that he might have is cut off.

It is not the possession of the power, but the using of the power in an unlawful manner, that constitutes a violation of the law.

Contracts and combinations, such as the statute refers to, are not such as are created by the ownership of property.

One company or one man might build two parallel lines of railroad; why should the same company not buy them after they are built?

The idea of the law is that separate and independent persons shall not agree to so use or operate their several properties as to restrain trade. It does not naturally or logically refer to those who own properties which may by reason of circumstances be more or less capable of being engaged in competition. The act of 1890 was not intended as a restraint on alienation.

Of these defendants, only the two railroad companies are engaged in interstate commerce. The Securities Company is a mere investment company, a purchaser of corporate shares, with no power to engage in transportation.

It owns no railroad, it operates none. Nor are the individual defendants engaged in interstate commerce.

The railroad companies have not contracted or combined to restrain trade. They have taken no part whatever in anything that has been done. *They* cannot be indicted or punished, therefore.

Nor have the individual defendants done anything to affect the operations of the railroad companies. They stand as mere vendors of stock; the Securities Company as a purchaser.

There is no proof whatever that it is not a genuine *bona fide* owner of all the stock it acquired.

Hence, we contend that the Sherman Act did not contemplate any interference with, or restraint upon, the *bona fide* purchase and sale of property, although it might consist of the instruments or means by which competing interstate commerce is carried on.

To hold otherwise would be to say that every purchase of a vessel by one transatlantic steamship company from another was illegal, because it removed that ship from competitive international trade.

It would render illegal every sale of cars or locomotives by one railroad company to another.

It would invalidate every lease, consolidation or merger of competing railroad or steamship lines that has been made since 1890.

It would prevent one person, or firm or company, from buying stock in two competing corporations engaged in interstate traffic, when the purchase of a controlling interest might be necessary or advisable for its benefit or protection.

It would forbid the exercise of ordinary influence for the purpose of securing friendly management through the election of directors of known tendencies or disposi-

tion towards the question of active or aggressive competition.

And, eventually all such transactions would come to depend for their validity, not upon the lawfulnes of the acts done, but upon the possible indirect consequences that might flow therefrom.

Now, the natural and direct result of community of control would be the making of agreements by or through the boards of directors and the officers to the two companies, which agreements would govern the action of each. Such an agreement could be reached and dealt with.

But the present proposition of the Government is that it can reach remote and intangible influences which affect the general policy of persons or corporations engaged in commerce.

III.

THE ACTS OF THE DEFENDANTS BEING *prima facie* LAWFUL, THE BURDEN OF PROOF IS UPON THE GOVERNMENT TO SHOW THAT THEY WERE, AS THE ATTORNEY-GENERAL CHARGES, NOT *bona fide*, BUT A MERE FORMAL DEVICE INTENDED TO DEFEAT THE PROVISIONS OF THE SHERMAN ACT.

Where a contract, agreement, or arrangemeut of any kind is challenged as a combination in restraint of trade or commerce, the Court will look at the form of the agreement, and if it appears on its face to have as a necessary and direct result the effect of restraining trade or commerce, no inquiry into the intention or motives of the parties is requisite (U. S. *v.* Joint-Traffic Association).

But if the arrangement is one which in itself is lawful, and is claimed to be invalid only because its ultimate object is to restrain commerce or competition, then it is

necessary to examine the facts and circumstances to see if the forms of law are being used to further an illegal purpose.

The distinction intended to be made is clearly pointed out in the following extract from the opinion of the Court in United States *v.* Trans-Missouri Freight Association (166 U. S., 341):

> "Although the case is heard on bill and answer, thus making it necessary to assume the truth of the allegations in the answer which are well pleaded, yet the legal effect of the agreement itself cannot be altered by the answer, nor can its violation of law be made valid by allegations of good intention or of desire to simply maintain reasonable rates; nor can the plaintiffs' allegations as to the intent with which the agreement was entered into be regarded, as such intent is denied on the part of the defendants. And if the intent alleged in the bill were a necessary fact to be proved in order to maintain the suit, the bill would have to be dismissed."

In this case, to use the language of the Court above quoted, "the intent alleged in the bill is a necessary fact to be proved in order to maintain the suit." And the Government having utterly failed to bring forward any proofs to sustain its allegation, it must be defeated upon the principle above declared.

This principle is further illustrated by the case of United States *v.* Hopkins (171 U. S., 578), where the Court says:

> "The first question, whether there is any combination in restraint of trade or commerce, or a combination to monopolize any part of trade or commerce, on the part of the defendant association, is to be determined, not alone from what appears upon the face of its preamble, rules and by-laws, but from the entire situation and the

> practical working and results of the defendants' methods of doing business as disclosed by the testimony in the case."

In United States *v.* Workingmen's Amalgamated Council (54 Fed. Rep., 994: 1893) it was held that in order to sustain the allegations of a bill praying an injunction against an alleged combination in restraint of interstate commerce, the Government might offer in evidence the official proclamation of the various officers, and also newspaper reports, supported by affidavits, containing manifestoes and declarations of the defendants.

So, too, in Addyston Pipe Co. case (175 U. S., 211), it is declared:

> "It is the effect of the combination in limiting and restricting the right of each of the members to transact business in the ordinary way, as well as its effect upon the volume or extent of the dealing in the commodity, that is regarded. All the facts and circumstances are, however, to be considered in order to determine the fundamental question—whether the necessary effect of the combination is to restrain interstate commerce."

In State *v.* Shippers' Compress and Warehouse Company (67 S. W. Rep., 1049) the State of Texas insisted that the defendant, by reason of its purchase of a number of compresses in different parts of the State of Texas, had violated the anti trust law of Texas, which prohibits combinations of capital, skill or acts, by two or more persons, firms, corporations, or associations of persons, for the purpose of creating and carrying out restrictions in aid of commerce. The Court held that there was no evidence that the purchase of the compresses by the defendant was made for the purpose of affecting competition, and that in the absence of such evidence the defendant corporation could not be dissolved.

Among other things, the Court said:

> "One may, if financially able, acquire much or all of the property of a given class, provided the purchase was not made for the purpose of injuring or accomplishing harmful results to the public, and from a bare exercise of this privilege it cannot be inferred that the purpose and intention was to create a monopoly, or that a monopoly necessarily results from such extensive acquisition."

This case was affirmed (69 S. W. Rep., 58).

The burden of proof is upon the Government to show that, while the act itself is in form lawful, the ultimate object and aim of the actors is to avoid the statute and violate the law. For instance, it is lawful to form a corporation to purchase and hold stock of railroad companies, and to do so does not make a case of violation of the Trust Act. There may be many such corporations, none of which has the slightest reference to the control of competition in railroad traffic. They are not *prima facie* illegal. They do not need to prove their lawful motives. Every presumption is in favor of their legal purpose. If, however, it be charged that they are intended as means for violating the act, and that they do violate it, that fact must be proved. Just as it is necessary to prove that a corporation is a mere device for cheating creditors, &c.

Now, if the contract is an agreement between separate railroad companies to regulate rates, or between separate companies engaged in interstate commerce to fix prices and regulate competition in bidding, there is no need to look into the motives of the parties—those motives are such as the agreement directly discloses, as was the case of the Addyston Pipe Company and its associates. So, also, it was in the case of the Jellico Coal Company, and its associates, and the California combi-

nation of coal dealers, which was dissolved by the Circuit Court for the Ninth Circuit. The agreements of the Trans-Missouri Freight Association and of the Joint-Traffic Association were also direct agreements between separate companies, the effect of which was a direct and obvious restraint of trade and commerce.

The case of the sugar manufacturers, however, was different. There the American Sugar Refining Company acquired by the purchase of stock the control of four other sugar refining companies and by reason of this control of practically all the sugar refineries of the United States, it was alleged that it was in a position where it would be enabled to create a monopoly in the purchase and sale of refined sugar. The ulterior motive of the purchasing company was relied upon as indicative of an intention to violate the Anti-Trust Act, and its ability to do so by reason of purchases of stock of the other companies was claimed by the Government to be a sufficient ground for dissolving the arrangement — merely because that arrangement put it in the power of the American Sugar Refining Company to create a partial monopoly in the purchase and sale of refined sugar, and that such was its purpose and intent.

In that case the Government alleged that the contract for the purchase by the American Sugar Refining Company of the shares of capital stock of the four other companies was an unlawful and fraudulent scheme by which the American Sugar Refining Company attempted to control all the sugar refineries for the purpose of restraining the trade thereof with other States, and that the contracts were made with the intent to enable the American Sugar Refining Company to restrain the sale of refined sugar in Pennsylvania and among the several States, and to increase the regular price at which refined sugar was sold.

One of the facts found by the Circuit Judge was that the object in purchasing the Philadelphia refineries was to obtain a greater influence, or more perfect control, over the business of refining and selling sugar in this country. But the Court would not go beyond the direct results of the acts done, which were to put the control of the manufacture of sugar in the Sugar Refining Company. The Court rejected the contention that the ulterior motive of the parties was to be considered, and that they were to be condemned and their association dissolved merely because they had assumed a position whereby they might in the future exercise control over interstate commerce in refined sugar. That result, if it followed from the acts done, was held to be not the direct consequence of the lawful acts of the parties, but an indirect result affecting, not directly, but only collaterally and incidentally, interstate trade and commerce; and, therefore, the Court held that the defendants, although they were undoubtedly in a position to control the prices of manufactured sugar throughout the States of the Union, had not come within the purview of the act.

The Knight case, in its principle, is absolutely conclusive of the present case. The two cases resemble each other in that the thing done is the acquirement of the capital stock of other companies, and they are further identical in this, that neither has entered into any agreement or arrangement whatever affecting competition or restraining trade, but both alike are merely so situated by reason of certain lawful purchases which they have made, that it is possible hereafter that they may exert some influence or control over the companies whose stock they own, which influence or control will have an effect upon interstate commerce. But this effect, if any there be, is only incidental to the lawful exercise of the

right of the Northern Securities Company to acquire, hold and vote stock in the two railroad companies. The charters of these railroad companies declare their stock to be personal property capable of purchase and sale without restriction, and in acquiring their shares the Northern Securities Company has exercised an ordinary right conferred upon it by the statutes of the State of its organization, and not in conflict with the statutes of any of the States which have given existence to the railroad corporations. The same things that have been done by the Northern Securities Company might have been done by a natural person.

IV.

ANY RESTRAINT OF TRADE OR COMMERCE WHICH MAY RESULT FROM THE ACTS DONE BY THE DEFENDANTS IS INDIRECT AND INCIDENTAL ONLY, AND NOT COVERED BY THE ACT OF JULY 2, 1890.

In every instance where the Supreme Court has had occasion to pass upon the meaning of that act it has been extremely careful to distinguish between acts which directly restrain commerce, and acts which only indirectly or incidentally have that effect.

> *United States* v. *E. C. Knight Co.*, 156 U. S. 1 (12, 16).

The American Sugar Refining Company, one of the defendants, was incorporated under the laws of New Jersey, with authority to purchase, refine and sell sugar. Four other companies, incorporated under the laws of Pennsylvania, with the same authority, located in Philadelphia, and engaged in refining sugar in competition with the American Sugar Refining Company, were separately taken into the control of the latter company

by purchase from the stockholders of each of the Philadelphia corporations of their holdings of stock in exchange for stock in the American Sugar Refining Company.

The bill of complaint alleged that this was an unlawful and fraudulent scheme by which the American Sugar Refining Company attempted to control all the sugar refineries for the purpose of restraining the trade thereof with other States as theretofore carried on independently by the defendants.

As pointed out in the opinion of Mr. Chief Justice Fuller, the subject-matter of the sale was *shares of manufacturing stock.*

> "The argument is that the power to control the manufacture of refined sugar is a monopoly over a necessary of life, to the enjoyment of which by a large population of the United States interstate commerce is indispensable, and that, therefore, the general government, in the exercise of the power to regulate commerce, may repress such monopoly directly and set aside the instruments which have created it. But this argument cannot be confined to necessaries of life merely, and must include all articles of general consumption. Doubtless the power to control the manufacture of a given thing involves in a certain sense the control of its disposition, but this is a secondary and not the primary sense; and although the exercise of that power may result in bringing the operation of commerce into play, it does not control it, and affects it only incidentally and indirectly."
>
> "It was in the light of well-settled principles that the Act of July 2, 1890, was framed. Congress did not attempt thereby to assert the power to deal with monopoly directly as such; *or to limit and restrict the rights of corporations created by the States or the citizens of the States in the acquisition, control, or disposition of property;* or to

regulate or prescribe the price or prices at which such property or the products thereof should be sold; *or to make criminal the acts of persons in the acquisition and control of property which the States of their residence or creation sanctioned or permitted.* Aside from the provisions applicable where Congress might exercise municipal power, what the law struck at was combinations, contracts, and conspiracies to monopolize trade and commerce among the several States or with foreign nations; but the contracts and acts of the defendants related exclusively to the acquisition of the Philadelphia refineries and the business of sugar refining in Pennsylvania, and bore no direct relation to commerce between the States or with foreign nations. The object was manifestly private gain in the manufacture of the commodity, but not through the control of interstate or foreign commerce. It is true that the bill alleged that the products of these refineries were sold and distributed among the several States, and that all the companies were engaged in trade or commerce with the several States and with foreign nations; but this was no more than to say that trade and commerce served manufacture to fulfill its function. Sugar was refined for sale, and sales were probably made at Philadelphia for consumption, and undoubtedly for resale by the first purchasers throughout Pennsylvania and other States, and refined sugar was also forwarded by the companies to other States for sale. Nevertheless it does not follow that an attempt to monopolize, or the actual monopoly of the manufacture was an attempt, whether executory or consummated, to monopolize commerce, even though, in order to dispose of the product, the instrumentality of commerce was necessarily invoked. *There was nothing in the proofs to indicate any intention to put a restraint upon trade or commerce, and the fact, as we have seen, that trade or commeree might be indirectly affected was not enough to entitle complainants to*

a decree. The subject-matter of the sale was shares of manufacturing stock, and the relief sought was the surrender of property which had already passed and the suppression of the alleged monopoly in manufacture by the restoration of the *status quo* before the transfers, yet the Act of Congress only authorized the circuit courts to proceed by way of preventing and restraining violations of the Act in respect of contracts, combinations or conspiracies in restraint of interstate or international trade or commerce."

In the United States *v.* Joint-Traffic Association (171 U. S., 505, 566), Mr. Justice Peckham, to a limited extent, indicates the classes of contracts or transactions which are not within the prohibition of the Sherman Act. He says:

"In dwelling upon the far-reaching nature of the language used in the act as construed in the case mentioned, counsel contend that the extent to which it limits the freedom and destroys the property of the individual can scarcely be exaggerated, and that ordinary contracts and combinations, which are at the same time most indispensable, have the effect of somewhat restraining trade and commerce, although to a very slight extent, but yet, under the construction adopted, they are illegal.

"As examples of the kinds of contracts which are rendered illegal by this construction of the act, the learned counsel suggest all organizations of mechanics engaged in the same business for the purpose of limiting the number of persons employed in the business, or of maintaining wages; the formation of a corporation to carry on any particular line of business by those already engaged therein; a contract of partnership or of employment between two persons previously engaged in the same line of business; the appointment by two producers of the same person to sell

their goods on commission; the purchase by one wholesale merchant of the product of two producers; the lease or purchase by a farmer, manufacturer or merchant of an additional farm, manufactory or shop; the withdrawal from business of any farmer, merchant or manufacturer; a sale of the good-will of a business with an agreement not to destroy its value by engaging in a similar business; and a covenant in a deed restricting the use of real estate. It is added that the effect of most business contracts or combinations is to restrain trade in some degree.

"This makes quite a formidable list. It will be observed, however, that no contract of the nature above described is now before the Court, and there is some embarrassment in assuming to decide herein just how far the act goes in the direction claimed. Nevertheless, we might say that *the formation of corporations for business or manufacturing purposes has never, to our knowledge, been regarded in the nature of a contract in restraint of trade or commerce.* The same may be said of the contract of partnership. It might also be difficult to show that the appointment by two or more producers of the same person to sell their goods on commission was a matter in any degree in restraint of trade.

"We are not aware that it has ever been claimed that a lease or purchase by a farmer, manufacturer, or merchant of an additional farm, manufactory, or shop, or the withdrawal from business of any farmer, merchant, or manufacturer, restrained commerce or trade within any legal definition of that term; and the sale of a good-will of a business with an accompanying agreement not to engage in a similar business was instanced in the Trans Missouri case as a contract not within the meaning of the act; and it was said that such a contract was collateral to the main contract of sale, and was entered into for the purpose of enhancing the price at which the vendor

sells his business. The instances cited by the counsel have, in our judgment, little or no bearing upon the question under consideration. In *Hopkins* v. *United States*, decided at this term, we have said that the statue applies only to those contracts whose direct and immediate effect is a restraint upon interstate commerce, and that to treat the act as condemning all agreements under which, as a result, the cost of conducting an interstate commercial business may be increased, would enlarge the application of the act far beyond the fair meaning of the language used. *The effect upon interstate commerce must not be indirect or incidental only. An agreement entered into for the purpose of promoting the legitimate business of an individual or corporation, with no purpose to thereby affect or restrain interstate commerce, and which does not directly restrain such commerce, is not, as we think, covered by the act, although the agreement may indirectly and remotely affect that commerce.* We also repeat what is said in the case above cited, that 'the Act of Congress must have a reasonable construction, or else there would scarcely be an agreement or contract among business men that could not be said to have, indirectly or remotely, some bearing upon interstate commerce, and possibly to restrain it.' To suppose, as is assumed by counsel, that the effect of the decision of the Trans-Missouri case is to render illegal most business contracts or combinations, however indispensable and necessary they may be, because, as they assert, they all restrain trade in some remote and indirect degree, is to make a most violent assumption, and one not called for or justified by the decision mentioned, or by any other decision of this Court."

"Where the grantees of this public franchise are competing railroad companies for interstate commerce, we think Congress is competent to forbid any agreement or combination among them by means of which competition is to be smothered.

"Although the franchise, when granted by the State, becomes by the grant the property of the grantee, yet there are some regulations respecting the exercise of such grants which Congress may make under its power to regulate commerce among the several States. This will be conceded by all, the only question being as to the extent of the power.

"We think it extends at least to the prohibition of *contracts relating to interstate commerce*, which would extinguish all competition between otherwise competing railroad corporations, and which would in that way restrain interstate trade or commerce. We do not think that when the grantees of this public franchise are competing railroads seeking the business of transportation of men and goods from one State to another, that ordinary freedom of contract in the use and management of their property requires the right to combine as one consolidated and powerful association for the purpose of stifling competition among themselves, and of thus keeping their rates and charges higher than they might otherwise be under the laws of competition. And this is so, even though the rates provided for in the agreement may, for the time, be not more than are reasonable. They may easily and at any time be increased. It is the combination of these large and powerful corporations, covering vast sections of territory and influencing trade throughout the whole extent thereof, *and acting as one body in all matters over which the combination extends*, that constitutes the alleged evil, and in regard to which, so far as the combination operates upon and restrains interstate commerce, Congress has power to legislate and prohibit."

Addyston Pipe and Steel Co. v. *United States* (175 U. S., 211) involved a direct agreement between six separate, independant corporations, the direct, immediate and intended effect of which was to restrain trade

by preventing competition for contracts and enhancing prices.

It was held that it was to obtain that particular and specific result that the combination was formed.

But the Court, in rendering its judgment, is very careful to distinguish between a combination whose direct and immediate effect is to restrain trade and destroy competition, and those cases, such as Hopkins *v.* United States, Anderson *v.* United States, and United States *v.* E. C. Knight Co., where the agreement entered into does not directly relate to and act upon and embrace interstate commerce, but was executed for another and entirely different purpose, which it was calculated to attain, and where the effect upon interstate commerce is only indirect and incidental.

In commenting upon the Knight case, after quoting the language of Mr. Chief Justice Fuller, the opinion goes on to say:

> "The *direct* purpose of the combination in the Knight case was the control of the manufacture of sugar. There was no combination or agreement, in terms, regarding the future disposition of the manufactured article; nothing looking to a transaction in the nature of interstate commerce. The probable intention on the part of the manufacturer of the sugar to thereafter dispose of it by sending it to some market in another State was held to be immaterial and not to alter the character of the combination. The various cases which had been decided in this court relating to the subject of interstate commerce and to the difference between that and the manufacture of commodities, and also the police power of the States as affected by the commerce clause of the Constitution, were adverted to, and the case was decided upon the principle that a combination simply to control manufacture was not a violation of the Act of Congress, because such a con-

tract or combination did not directly control or affect interstate commerce, but that *contracts for the sale and transportation to other States* of specific articles were proper subjects for regulation, because they did form part of such commerce.

"We think the case now before us involves contracts of the nature last above mentioned, not incidentally or collaterally, but as a direct and immediate result of the combination engaged in by the defendants.

"While no particular contract regarding the furnishing of pipe and the price for which it should be furnished was in the contemplation of the parties to the combination at the time of its formation, yet it was their intention, as it was the purpose of the combination, to directly and by means of such combination increase the price for which all contracts for the delivery of pipe within the territory above described should be made, and the latter result was to be achieved by abolishing all competition between the parties to the combination. *The direct and immediate result* of the combination was, therefore, necessarily a restraint upon interstate commerce in respect of articles manufactured by any of the parties to it to be transported beyond the State in which they were made. The defendants, by reason of this combination and agreement, could only send their goods out of the State in which they were manufactured for sale and delivery in another State *upon the terms and pursuant to the provisions of such combination.* As pertinently asked by the Court below, was not this a direct restraint upon interstate commerce in those goods?"

United States v. *Chesapeake and Ohio Fuel Co.*, 105 Fed. Rep., 93.

This was a contract by which the Chesapeake and Ohio Fuel Company, a corporation, entered into an

agreement with a number of persons, firms, and corporations engaged in mining coal and making coke in a certain district to take their entire product which was intended for western shipment, to sell the same at not less than a minimum price to be fixed by an executive committe appointed by the producers, and to account for and pay over to such producers the entire proceeds above a fixed sum per ton, to be retained as compensation—the stated purpose being to enlarge the western market.

This was held to be a contract affecting interstate commerce, and subject to the provisions of the Sherman Act. The prime object of the contract, as repeatedly expressed therein, was to enlarge the sale of, and extend, the western market for Kanawha coal and coke. This case was affirmed by the Circuit Court of Appeals, 115 Fed. Rep., 610.

V.

IF THE SHERMAN ACT CAN BE SO CONSTRUED AS TO FORBID THE SALE OF STOCK IN TWO COMPETING RAILROAD CORPORATIONS TO ONE PURCHASER, THEN THAT ACT IS AN ATTEMPTED INTERFERENCE ON THE PART OF CONGRESS WITH TRANSACTIONS WHICH ARE WHOLLY WITHIN THE CONTROL OF THE STATES OF THE UNION, AND IN THAT RESPECT THE ACT IS UNCONSTITUTIONAL.

Every specific act which enters into the substance of the Government's complaint was done under the clear authority of State legislation.

The incorporation of the Northern Securities Company was authorized by the corporation laws of New Jersey, which laws confer upon it the powers enumerated in its charter.

The shares of the two railroad companies were made personal property, purchasable by all persons natural and

corporate without restriction, by the States of Wisconsin and Minnesota, respectively.

The transactions resulting in the actual purchase of those shares by the Securities Company did not, in any way, embrace any act of interstate commerce.

The right of the Securities Company to hold the shares, to vote upon them, and to receive dividends upon them, is derived from State laws, and the United States has no constitutional power to forbid, restrain or regulate the Company's rights in any of these respects, without trenching upon powers that are reserved to the several States.

There are many cases in which the extent of State legislative power over the instrumentalities of interstate commerce has been considered. (See Louisville & N. R. Co. *v.* Kentucky, 161 U. S., 702; C. & C. Bridge Co. *v.* Kentucky, 154 U. S., 204).

But there is no case where the United States has been held to have the concurrent power of police regulation merely because some of the objects of such regulation may ultimately affect or enter into interstate commerce.

Regulation of commerce, to be constitutional, must be confined to commerce itself, and cannot reach out to those things which, not being designed as agencies of such commerce, or not being actually engaged in commerce, may yet have an indirect or ultimate relation to it.

Such a construction of the constitution would vest in Congress the regulation of all branches of productive business from their first beginnings.

As is remarked in the License Tax cases (72 U. S., 462):

> "Over this (internal) commerce and trade, Congress has no power of regulation, nor any direct control. This power belongs exclusively to the States. No interference by Congress with the

> business of citizens transacted within a State is warranted by the Constitution, except such as is strictly incidental to the exercise of powers clearly granted to the legislature."

The fact that an article was manufactured for export to another State does not make it an article of interstate commerce.

Coe *v.* Errol, 116 U. S., 517.
Kidd *v.* Pearson, 128 U. S., 1.

The creation of State corporations and the regulation of the sales of corporation shares belong to the class of business affairs over which the States have exclusive jurisdiction.

When a State, by its grant of a charter, has given certain valuable qualities to capital stock, Congress cannot by legislation take away any of those qualities; for instance, limit the extent of its negotiability by making its purchase or sale dependent upon the uses which the purchaser intends to make of it.

In U. S. *v.* Boyer (85 Fed. Rep., 425) Acts of Congress empowering the Secretary of Agriculture to make inspection of cattle, &c., at slaughter houses located in the several States, the products of which were intended for sale in other States or foreign countries, were declared to be without any constitutional warrant, and therefore void, although the Government sought to sustain them as a legitimate exercise of the commerce powers.

Whatever any of the corporations defendants in this suit may do in the actual transaction of interstate commerce is properly subject to the laws of the United States regulating that subject, but the internal affairs of the corporations, as distinguished from the transportation business that they carry on, are not commerce in any sense of the word.

All the acts done by the defendants might have been

done in any foreign state or kingdom. If the Northern Securities Company had been formed in Canada, and the stock of the two railroad companies transferred to it there, would any one deem that transaction to be one affecting directly interstate or international commerce?

As a matter of fact, the sale of the stock of the two railroad corporations, no matter to whom it may be sold, nor how often such sales and transfers of the stock may take place, cannot, in any proper sense, be said to affect the transportation business carried on by the company.

Very pertinent and emphatic on this point is the opinion of Mr. Justice Jackson, sitting in the U. S. Circuit Court at Savannah, in the case of Clarke *v.* Central R. R. & Banking Co. of Georgia (June 30, 1893), which is printed in the appendix to this brief.

> "I concede," he says, "that the State of Georgia may put in limitations and restrictions upon corporations in respect to the amount of property they shall acquire; in respect to the amount of stock they may authorize a corporation to issue; but I say that when that corporation has issued that stock, when it goes abroad as property, there is no power in this land that can deny to the owner the right to sell it, nor deny to the individual the right to buy it; and if a corporation is created by any State with power to own and purchase stock, that that corporation is entitled to buy that stock, and that Georgia, in her constitution and in her legislature, could not prohibit it." * * * *
>
> "The Terminal had a right to acquire that stock, had a right to own it and to vote it. But it is said it might lead, or may lead, or was intended to lead, to a condition that would prevent competition. How so? How so?

"Is there any competition in point of fact between the Central Railroad and Banking Company and the Georgia Pacific leading out to the Northwest from Atlanta—that is, the lessee? What competition in the eye of the law? I can suggest to you, gentlemen, a case that would have fallen within the constitution of Georgia, perhaps. If the East Tennessee, Virginia and Georgia Railroad Company, running a line from Atlanta to the coast, parallel to the Central Railroad Company, had as a corporation—had as a corporation—I emphasize that, had, as a corpofation, undertaken to buy up the stock of the Central Railroad Company you would then have had a case coming within the purview and principle of the constitution of Georgia. But they say because a stockholder in two corporations had stock in two corporations that that stockholder cannot vote in both corporations. It is an anomaly beyond expression to my mind. But it does not come within any inhibition of the constitution of Georgia. When those contracts are purchased, personal properties are made beyond the jurisdiction of Georgia. To say that is illegal by Georgia law cannot be sustained.

"For Georgia law cannot reach the transaction, Georgia law cannot deal with those stocks and inhibit their purchase and their sale, and the only question in this case that ever would have given trouble would have been the power of that corporation, the Terminal Company and the North Carolina Company to have held and owned such stock. but they each had the power of the sovereigns that created them to purchase, acquire and hold these stocks, and there is nothing in the constitution of Georgia or in its laws to deny them their rights and interests as such holders in this property."

Equally emphatic in its language is the decision of Mr. Justice Jackson, sitting in the Circuit Court for the

Southern District of Ohio, *in re* Greene, 52 Fed. Rep., 104 (112):

> "Congress may place restrictions and limitations upon the right of corporations created and organized under its authority to acquire, use and dispose of property. It may also impose such restrictions and limitations upon the citizen in respect to the exercise of a public privilege or franchise conferred by the United States. But Congress certainly has not the power or authority under the commerce clause, or any other provision of the Constitution, to limit and restrict the right of corporations created by the States or the citizens of the States in the acquisition, control and disposition of property. Neither can Congress regulate or prescribe the price or prices at which such property, or the products thereof, shall be sold by the owner or owners, whether corporations or individuals. It is equally clear that Congress has no jurisdiction over and cannot make criminal, the aims, purposes and intentions of persons in the acquisition and control of property which the States of their residence or creation sanction and permit. It is not material that such property, or the products thereof, may become the subject of trade or commerce among the several States or with foreign nations." * * *
>
> "It is not very clear what Congress meant by the second section of the Act of July 2, 1890, in declaring it a misdemeanor to 'monopolize,' or 'attempt to monopolize,' any part of the trade or commerce among the States or with foreign nations. It is very certain that Congress could not and did not, by this enactment, attempt to prescribe limits to the acquisition, either by the private citizen or State corporation, of property which might become the subjects of interstate commerce, or declare that, when the accumulation or control of property by legitimate means and lawful methods reached such magnitude or pro-

portions as enabled the owner or owners to control the traffic therein, or any part thereof, among the States, a criminal offense was committed by such owner or owners. All persons, individually or in corporate organizations, carrying on business avocations and enterprises involving the purchase, sale or exchange of articles, or the production and manufacture of commodities, which form the subjects of commerce, will, in a popular sense, monopolize both State and interstate traffic in such articles or commodities just in proportion as the owner's business is increased, enlarged and developed. But the magnitude of a party's business, production, or manufacture, with the incidental and indirect powers thereby acquired, and with the purpose of regulating prices and controlling interstate traffic in the articles or commodities forming the subject of such business, production or manufacture, is not the monopoly, or attempt to monopolize, which the statute condemns."

The familiar language of Mr. Justice Brown in Pearsall *v.* Great Northern Railroad Company (161 U. S., 646, 671) also applies:

"Doubtless, these stockholders could lawfully acquire, by individual purchases, a majority, or even the whole, of the stock of the reorganized company, and thus possibly obtain its ultimate control; but the companies would still remain separate corporations, with no interests as such in common."

See also

Rogers *v.* Nashville, etc., R. Co., 92 Fed. Rep., 312.

VI.

BUT ASSUMING THAT CONGRESS MAY, UNDER THE COMMERCE CLAUSE OF THE CONSTITUTION AND AS A REGULATION OF COMMERCE, RESTRAIN THE STATES IN THE

EXERCISE OF THEIR PREROGATIVES FROM PERMITTING TWO OR MORE CORPORATIONS TO WHICH THE STATES HAVE GIVEN LIFE FROM MERGING, YET SUCH A PURPOSE ON THE PART OF THE GOVERNMENT OUGHT TO BE CLEARLY AND DISTINCTLY EXPRESSED, AND NOT BE FOUND IN THE JUDICIAL INTERPRETATION OF DOUBTFUL LANGUAGE CONTAINED IN A PENAL STATUTE.

So that, if it be argued that Congress may forbid the sale of one railroad to another, it is enough to reply that it has never done so; that the Sherman Act does not expressly, or by any just interpretation, do so.

We need not ask the Court to decide whether it would be competent for Congress to forbid the purchase or holding by one person of stock in the two parallel and competing railroad corporations; nor whether the amount of stock which might be thus held could, by statute, be limited to less than a majority. It is sufficient to say that Congress has never attempted any such thing.

The Sherman Act is a penal statute; every act which may be prevented by injunctiive order would, if committed and proven, subject the parties to criminal prosecution. The rule of strict construction must be therefore applied.

> "Statutes creating crimes will not be extended by judicial interpretation to cases not plainly and unmistakably within their terms. If this rule is lost sight of, the courts may hold an act to be a crime when the Legislature never so intended. If there is fair doubt whether the act charged in the indictment is embraced in the criminal prohibition, that doubt is to be resolved in favor of the accused." Per Dillon, J., in
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> United States *v.* Whittier, 5 Dill., 219.

See also

United States *v.* Sheldon, 2 Wheat., 119; 4 L. ed, 199;
United States *v.* Hartwell, 6 Wall., 395; 18 L. ed., 832;
United States *v.* Shackford, 5 Mason, 445.
United States *v.* Clayton, 2 Dill., 219;
United States *v.* Garretson, 42 Fed. Rep., 22;
Dwarris, Stat. 641;
Hubbard *v.* Johnstone, 3 Taunt., 177.

The act is confined to contracts, combinations and conspiracies in restraint of trade or commerce.

The direct effect or object of the contract or conspiracy must be to restrain trade or commerce.

Acts which in themselves do not amount to a restraint of trade or commerce, such as the purchase and sale of railroads, factories, implements of interstate commerce, shares in transportation companies, etc., are lawful; they cannot be forbidden without interfering with the liberty of contract. Such things are not included in the language of the statute, and the Court will not insert them.

Had Congress intended to abridge the right to purchase and sell railroad property or steamships, or shares in transportation companies, or telegraph or cable companies, so as to prevent the indirect control of interstate or international commerce which may arise from the ordinary dealings of the business world, and to render such acts criminal, it is fair to insist that Congress was bound to use language plainly indicative of such intention.

VII.

ACQUIESCENCE BY THE GOVERNMENT FOR MORE THAN ELEVEN YEARS IN THE ACTUAL MERGER AND CONSOLIDATION OF MANY IMPORTANT PARALLEL AND COMPETING LINES OF RAILROADS AND STEAMSHIPS ENGAGED IN INTERSTATE AND

INTERNATIONAL COMMERCE, HAS GIVEN A PRACTICAL CONSTRUCTION TO THE ACT OF JULY 2, 1890, TO THE EFFECT THAT IT WAS NOT INTENDED TO FORBID, AND DOES NOT FORBID, THE NATURAL PROCESSES OF UNIFICATION WHICH ARE BROUGHT ABOUT UNDER MODERN METHODS OF LEASE, CONSOLIDATION, MERGER, COMMUNITY OF INTEREST, OR OWNERSHIP OP STOCK.

In Stuart *v.* Laird (1 Cranch, 299), the right of a justice of the Supreme Court to sit as a Circuit Judge was challenged, upon the ground that, not having been appointed as such, and not having been distinctly commissioned as such, the Act of Congress of 1789, under which the Circuit Court was originally instituted, was unconstitutional. The case arose in 1801, and was decided in the Supreme Court in 1803. To this objection the Court, in its opinion, answered:

> "It is sufficient to observe, that practice and acquiescence under it for a period of several years, commencing with the organization of the judicial system, affords an irresistible answer, and has indeed fixed the construction. It is a contemporary interpretation of the most forcible nature. This practica' exposition is too strong and obstinate to be shaken or controlled. Of course, the question is at rest, and ought not to be disturbed."

It will be observed that the period of acquiescence which the Court held to be sufficient to make a practical exposition which could not be shaken or controlled, was only twelve years, which is about the same period which has elapsed since the passage of the Sherman Act.

The argument of Mr. Lee in support of his point against the constitutionality of the Act of 1789, if the Court will be good enough to peruse it, will indicate that there were much more direct and substantial reasons for holding that the provisions of the Constitution applied to and

condemned the Act than exist here for holding that the statute of 1890 applied to the consolidation of railroad corporations.

The doctrine enunciated in Stuart *v.* Laird has been followed in numerous later cases. It is a just principle of jurisprudence, founded upon the very highest considerations of public equity.

It has frequently been invoked and enforced in order to prevent the disturbance and unsettlement of important affairs which have been transacted in reliance upon a general public and private belief that the law did not include them in its terms of condemnation.

But we venture the assertion that no case has ever arisen in which a disregard of that salutary rule of construction would result in such widespread and irremediable injury to vested interests as this. Not that any decree which this Court could make against these defendants would particularly or radically affect their property interests, but because the decision once made that the Sherman Act applies to such transactions as the purchase, lease, merger or consolidation of parallel lines of transportation, would render every such transaction for the last thirteen years unlawful, and require the Attorney-General, in the due discharge of his duty, to bring suit for dissolution and injunction. Unnumbered millions of dollars of capital stock and bonds issued upon railroad mergers and consolidations would be tainted with illegality, or affected in value by the withdrawal of the property against which they were issued. Purchases of stock in underlying roads long ago made and paid for would be unsettled, and financial chaos would result.

On this point we can accept the full extent of the limitation upon the application of the doctrine of contemporaneous construction stated by Mr. Justice Brown, in L. & N. R. Co. *v.* Kentucky (161 U. S., 690, 693):

> "While the doctrine of contemporaneous construction is doubtless of great value in determining the intentions of parties to an instrument ambiguous upon its face, yet to justify its application to a particular case, such contemporaneous construction must be shown to have been as broad as the exigencies of the case require."

VII.

THE ILLOGICAL CHARACTER OF THE OPINION OF THE CIRCUIT COURT IS MOST CLEARLY REVEALED WHEN IT COMES TO MAKE UP THE DEFINITIVE INJUNCTION DECREE.

The only power of the Court under the Statute is to "prevent and restrain" the carrying into effect of contracts, combinations and conspiracies such as the act makes unlawful.

If this holding company is, in legal conception, a combination which has as yet merely the power to restrain trade, but has not exercised that power, the logical decree would be one directing it to refrain from using its power to exercise any control over the two railway companies *for the purpose or with the effect of restraining trade or abating competition.*

But by the decree which the Court did make, the Securities Company is forbidden to exercise *any control whatever* over the two railroad companies.

It is further enjoined from voting on the stock which it owns; from receiving dividends thereon; from acquiring any further stock of the railroad companies or either of them.

If (as is the case) the only fact out of which, in the opinion of the Court, a violation of the law arises, is the ownership of a majority of the stock of both railway companies, and the *power* arising therefrom to control both roads, then it would seem, (1), that the only decree

permissible is one enjoining the Securities Company from so using its power as to restrain trade; or, (2), to require it to part with sufficient of the stock of either company to reduce its holdings below a majority, in which event the *power* of control would be gone.

It is submitted that even if the view of the Circuit Court that the facts shown create an unlawful combination in restraint of trade be conceded to be correct, the relief to which the Government is entitled is solely preventive, and cannot be specifically extended beyond enjoining the exercise of the power; and that if the Northern Securities shall part with enough stock of either road to reduce its holdings below a majority, it will have stripped itself of the power of control which is criticised, and will thenceforth be free from the imputation of unlawful restraint of trade.

It is submitted that the decision of the Circuit Court is erroneous and should be reversed; and that the decree founded upon that decision is not warranted by law, and should be set aside.

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